Supreme Court, U.S.
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No.

SUPREME COURT OF THE UNITED STATES

JOHN C. MANDANICI, JR.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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66 pgs

A. Question Presented For Review

1. In non-AEDPA cases, should the Court adopt the opinion of the minority in *Tyler v. Cain*, 533 U.S. 656 (2001), in which four Justices determined that new decisions concerning the reasonable doubt standard should be given retroactive application in collateral relief cases?

B. List Of All Parties

The caption of the case lists all the parties.

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D. Citation Of Official And Unofficial Reports

The ruling by which the Second Circuit denied the petitioner's Motion To Recall And Modify The Court's Mandate And Decision is unreported but the court's short order is contained in the Appendix (App.), 2a. The original decision that the petitioner sought to recall and modify is *United States v. Mandanici*, 205 F.3d 519(2nd Cir. 2000). That decision is also contained in the Appendix. App. 3a-26a.

E. Statement Of The Basis For Jurisdiction

i. On October 31, 2001, the United States Court Of Appeals For The Second Circuit filed its decision denying the petitioner's Motion To Recall And Modify The Court's Mandate And Decision, which is the subject of this petition.

ii. On February 28, 2002, the United States Court of Appeals For The Second Circuit denied the Petition For Rehearing With Suggestion For Rehearing En Banc timely filed by the petitioner.

iii. The statute that confers on this Court the jurisdiction to review on a writ of certiorari the above judgment is 28 U.S.C., Sec. 1254. The statute that provided jurisdiction in the District Court is the All Writs Statute, 28 U.S.C., Sec. 1651. Local Rule 27(c) of the Federal Rules of Appellate Procedure and case law provided the Second Circuit the power to grant the petitioner's said Motion To Recall And Modify The Court's Mandate And Decision.

F. Constitutional And Statutory Provisions

The constitutional provisions are the Fifth and Sixth Amendments that state in pertinent part:

> "No person shall be ... deprived of life, liberty, or property, without due process of law". Fifth Amendment.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." Sixth Amendment.

The All Writs Statute, 28 U.S.C., Sec. 1651, states that the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law...."

The Second Circuit's Local Rule 27(c) of the Federal Rules of Appellate Procedure states:

> "(c) Motions To Be Heard by a Panel Which Has Rendered a Decision. Motions addressed to a previous decision or order of the court or for a stay, recall or modification of any mandate or decision of the court or to withdraw or dismiss an appeal argued but not decided shall be referred by the clerk to the judges who heard the appeal, normally without oral argument."

The penal statute, 18 U.S.C., Sec. 1001, in effect at the time of the petitioner's trial in 1983 stated:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

G. Statement Of The Case

1. General Court History

The petitioner was convicted in 1983 of three counts of violating 18 U.S.C., Sec. 1001 but was found not guilty of the fourth count of violating 18 U.S.C., Sec. 1014. The court on June 17, 1983, imposed concurrent suspended sentences of five years imprisonment for Counts Two and Three and imposed fines for said counts totaling $20,000.00. The Court of Appeals For The Second Circuit reversed the jury's guilty conviction on Count One due to insufficient evidence and that no "rational juror" would have found the petitioner guilty. *United States v. Mandanici (Mandanici I)*, 729 F. 2d 914, 920(2nd Cir. 1984). The court affirmed the convictions on Counts Two and Three that are the subject of this petition.

In 1995, this Court in *United States v. Gaudin*, 515 U.S. 506, 519-521, 115 S.Ct. 2310, 132 L. Ed.2d 444(1995) held that the jury rather than the judge is required to decide materiality in a prosecution under the false statement statute, 18 U.S.C., Sec. 1001, repudiating in effect *Sinclair v. United States*, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 693 (1929). Thereafter the Second Circuit in *United States v. Ali*, 68 F.3d 1468, 1474-1475(2nd Cir. 1995) held that materiality is an element of all components of the false statement statute.

After the *Gaudin* decision was released, the petitioner later in 1995 filed a petition in the District Court seeking collateral relief in the form of a writ of coram nobis pursuant to the All Writs Statute, 28 U.S.C., Sec. 1651.[1] The petitioner

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[1] Even if a citizen is no longer in custody, a court can grant a writ of coram nobis pursuant to the All Writs Statute, 28 U.S.C., Sec. 1651, and vacate his or her convictions if there are "circumstances compelling such action to achieve justice" and to correct errors of the "most fundamental character". *United States v. Morgan*, 346 U.S. 502, 506-507, 511-512, 74 S.Ct. 247, 98 L. Ed. 248(1954). "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." *Id.*, 512-513. The legal consequences that the petitioner suffers from his said felony convictions, which are his only convictions, are that Connecticut law prohibits him

claimed that his constitutional rights to due process and to a jury trial were violated because the element of the materiality of his statements had not been decided by a jury using the reasonable doubt standard. In said petition and briefs the petitioner sought the retroactive application of *Gaudin* and *Ali*, stressing that the trial court had decided materiality by the use of the civil standard of a preponderance of the evidence that was unconstitutional. The District Court denied the petition.

The Second Circuit in *United States v. Mandanici (Mandanici II)*, 205 F.3d 519(2nd Cir. 2000), App. 2a, affirmed that denial. The court found that at the time of the petitioner's trial the law of the circuit was that materiality was not an element of the section of the false statement statute for which the petitioner was charged. *Mandanici II* at 522-523, 526-527, App. 6a-9a, 13a-16a. However, the court found that the trial judge treated that subsection as requiring that he decide the materiality of the statements but not by using the reasonable doubt standard but the civil standard of a preponderance of the evidence. *Id.* Although the Second Circuit stated that the constitutionally required reasonable doubt standard was not used, the court did not grant relief because it concluded that the *Gaudin* and *Ali* cases could not be applied retroactively in the petitioner's collateral relief case because the reasonable doubt standard does not have a "primacy and centrality" in the criminal justice system. *Mandanici II* at 526, 531, App. 14a, 23a-24a. The court held therefore that such cases did not meet the criteria for retroactive application in collateral relief cases set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Mandanici II* at 529-531, App. 21a-25a. The court conceded that the "question is a close one" and the case involved "complex constitutional questions." *Mandanici II* at 528, 527, n.15, App. 18a, 17a, n.15.

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from bearing arms and from obtaining certain licenses, Conn. Gen. Stat., Sec. 29-35(a), 28 (b)(2), 29, 37(b), Sec. 53a-217c, Sec. 29-153, 154a(4); and federal law prevents him from sitting as a juror and exposes him to greater sentences upon any subsequent conviction. 28 U.S.C., Sec. 1865(b)(5), USSG, Secs., 4A1.1-4A1.3.

The petitioner filed a Petition For Writ Of Certiorari, which this Court denied. *Mandanici v. United States*, U.S. , 121 S.Ct. 190, 148 L.Ed.2d 132 (2000).

Subsequently after this Court's decision in *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632(2001), in which the minority opinion mentioned the Second Circuit case of *Gaines v. Kelly*, 202 F.3d 598 (2nd Cir. 2000), the petitioner on August 7, 2001, filed in the Second Circuit a Defendant's Motion To Recall And Modify The Court's Mandate And Decision. In that motion the petitioner contended that the Second Circuit should modify its decision to conform to *Gaines* because *Gaines* contradicted the court's opinion in *Mandanici II* that new cases involving the reasonable doubt standard should not be applied retroactively in collateral relief cases. In *Gaines*, the Second Court held that the reasonable doubt standard "plays a *pivotal role* in ensuring the accuracy" of a trial and "[b]ecause any criminal conviction rendered pursuant to an unconstitutional definition of reasonable doubt is necessarily unfair, *see Teague*, 489 U.S. at 315, ... we conclude that ...[new cases describing situations where defective reasonable doubt instructions were used] fall... within the second exception to the *Teague* doctrine." *Gaines v. Kelly*, *supra*, 202 F.3d at 604-605 (emphasis added). In *Mandanici II*, the court issued a conflicting ruling based on its belief that the reasonable doubt standard was not pivotal and lacked a "*primacy and centrality*" in the criminal justice system. *Mandanici II* at 531, App. 23a. (Emphasis added.)

The petitioner contended that the *Gaines* case was controlling because under the court's rules earlier cases are controlling precedent.[2] The petitioner did not know about the

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2 The panel's decision in *Gaines v. Kelley* was the controlling precedent over *Mandanici II* because the *Gaines* decision was filed earlier. The decision in *Gaines v. Kelly*, *supra*, 202 F.3d at 598, was decided on February 1, 2000, and the decision in *Mandanici II*, *supra*, 205 F.3d at 519, App. 3a, was decided on February 23, 2000. "[T]his court is bound by a decision of a *prior panel* unless and until its *rationale* is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*." *In Re*

Gaines case when he filed a Petition For Rehearing With Suggestion For Rehearing En Banc concerning *Mandanici II* nor did he know about it when the Second Circuit denied that petition on May 12, 2000, nor when this Court denied his Petition For Writ Of Certiorari on October 2, 2000. The petitioner learned of the *Gaines* decision only after this Court granted certiorari in *Tyler* on December 11, 2000, and thus he waited until after the Court's ultimate ruling on the merits in *Tyler* before he filed his above Motion To Recall.[3] The ultimate ruling in *Tyler* could have obviously affected the merits of the petitioner's Motion To Recall.

In his Motion To Recall, the petitioner in addition to requesting that the court modify its decision to conform to the controlling Second Circuit precedent of *Gaines*, also requested the Second Circuit to consider the minority opinion in *Tyler*, which held that new cases involving the reasonable doubt standard should be applied retroactively in collateral relief cases because they meet the second *Teague* exception. *Tyler v.*

Sokolowski, 205 F.3d 532, 534-535(2nd Cir. 2000)(internal citation and citation marks omitted, emphasis added). A "decision of a panel of this Court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court". *Jones v. Coughlin,* 45 F.3d 677, 679(2nd Cir. 1995). The denial of the petitioner's subsequent request for a rehearing *en banc* concerning *Mandanici II* does not constitute an *en banc* ruling by the court. *See Irving v. United States*, 162 F.3d 154, 161, note 7(1st Cir. 1998), *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1479-1480(Fed. Cir. 1998). This Court in *Tyler v. Cain*, *supra*, 121 S.Ct. 2485, discussed whether new cases involving the reasonable doubt standard should be applied retroactively in collateral relief cases but refused to decide the issue. This Court's decision in *Tyler v. Cain* could have but did not overturn cases such as *Gaines v. Kelly*. The dissenting opinion in *Tyler*, *supra*, 2486-2490, if controlling, would have affirmed cases like *Gaines v. Kelly*. Therefore the prior decision of the panel in *Gaines v. Kelly* still remained the controlling law of the Second Circuit and the rationale behind that decision was a precedent that should have been recognized and followed by the panel in *Mandanici II*.

3 *See* the Affidavit In Support Of Defendant's Motion To Recall And Modify The Court's Mandate And Decision filed in the Second Circuit by the petitioner's attorney on August 7, 2001.

Cain, supra, 121 S.Ct at 2486-2490 (Breyer, J., dissenting). The majority did not reach the merits of that issue since *Tyler* was an AEDPA case and the Court held that in AEDPA cases it could only apply past Supreme Court cases that had already clearly decided the issue and the Court ruled that it had not decided that issue in earlier cases. *Supra*, 2482-2485. Since the petitioner's case was not an AEDPA case, the Second Circuit could have considered this Court's minority opinion as dicta worthy of consideration in deciding the petitioner's motion. Also, *Gaines* was not an AEDPA case since the petition in that case was filed in the district court in 1993, and thus the majority opinion in *Tyler* did not affect *Gaines* and it still remained controlling precedent in the Second Circuit.

The Second Circuit denied the petitioner's motion to recall in a short order without any formal opinion. App. 2a. The petitioner filed a Petition For Rehearing With Suggestion For Rehearing En Banc that the court denied on February 28, 2002. App. 27a-28a. The present petition concerns the denial of the petitioner's motion to recall.

2. Facts Of The Case

Not only did the Second Circuit find that the civil standard of proof was used at the petitioner's criminal trial, *Mandanici II* at 526, App. 14a, but the trial court in 1983 noted that the case was basically a civil case involving statements by the petitioner contained in a housing contract that he signed with the government. The court stated that the facts of the case "don't call for criminal remedies. This is a civil contract. I mean it's a contract with civil ramifications." *Record* submitted to the Second Circuit as part of the petitioner's earlier appeal in *Mandanici II* (hereafter referred to as *Record*), #27, p. 1165. It is worth noting that the trial court sua sponte almost dismissed the case. *Id.*, 1165-1169.

At sentencing, the court stated that the petitioner had not committed "fraud" and the court clearly implied that the government was not out "ten cents", was not "gyp[ped]", and that the petitioner pursuant to his contract with the government

provided the government with "Cadillac" style housing for the price of a "Ford" during the time of a housing shortage. *Record*, #30, p. 46, *Record*, #29, pp. 24-26. The court stated that there was a "dire need of housing in Bridgeport", and that a local official responsible for monitoring the contract had testified that "the situation was so desperate in Bridgeport that they went to Mr. Mandanici and said '*Please take these people*', and I had a State official come in and said that was a violation of law to *put people into housing without a contract, but the situation was so desperate that they kind of overlooked it.*" *Record*, #29, pp. 8, 26(emphasis added).

The petitioner's allegedly false statements were contained in government contracts and concerned the amount of rehabilitation work that he had completed on an apartment building to qualify for a subsidized housing program sponsored by the Department of Housing and Urban Development (HUD). The Indictment charged in Count Two that the petitioner in a preliminary Agreement To Enter Into Housing Assistance Payment Contract (AHAP) stated that "he *would perform* a total of $88,000 in rehabilitation work" when he "then well knew, the rehabilitation work that he *performed* on said property would not cost $88,000." (emphasis added). *See* Indictment in the Appendix submitted to the Second Circuit as part of the petitioner's appeal in *Mandanici II*, pp. 14a-15a. The Indictment in Count Three charged that in the final Housing Assistance Payment Contract (HAP), the petitioner stated that the apartment building "*had been rehabilitated* in accordance with the terms and conditions of [the AHAP]... whereas, in truth and fact [the petitioner] then well knew, the *work had not been performed* in accordance with the terms of the [AHAP]." *Id.*, 15a-16a (emphasis added).

However, the petitioner's actual statement in the later HAP contract that was the basis of Count Three was that the work had been completed "or will be completed". See Govt. Trial Exhibit #4, HAP Contract, Sec.1.3 (b), *Mandanici I*, *supra*, 729 F.2d at 916, 921(the actual statement by the petitioner in the HAP contract which was the basis of the

Third Count was that the work was completed "or will be completed"). It should be noted that a government witness actually testified that after the last contract (the HAP contract) was signed on July 1, 1981, the petitioner spent $6,000.00 more on work that he had agreed to do. *Record,* #22, pp. 233, 237. The petitioner testified that because the government moved in the tenants before the work was completed, he had difficulty completing the work. *Record*, # 26, pp. 975-978.

More importantly, even if the petitioner had stated, as contended by the respondent, that all the work had been completed, such statements concerning work completion were immaterial because the government knew that the work had not been completed and waived work completion due to the housing shortage and the actual quality of the petitioner's housing.[4] Local HUD officials responsible for monitoring and signing the contract with the petitioner testified that they knew

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[4] If a party waives a matter in a contract, then that matter is considered not to be material. "A party to a contract may waive provisions for his or her benefit. Likewise there may be a waiver of conditions precedent". 17B C.J.S., *Contracts*, Sec. 557. "A *waiver* may be express or it may be *inferred from actions, conduct, or a course of dealing*.... The parties may *waive* their right to demand compliance with a provision of such a contract where, on consent of both of them, they establish a *practice which is inconsistent* with such provisions." *Id.*, Secs. 558, 559(emphasis added). A waiver or modification can be oral even if the written contract states that any changes must be in writing. *Id.*, Sec. 414.

The law clearly allows government officials to waive provisions of contracts. " '[W]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' *Lynch v. United States*, 292 U.S. [571, 579, 54 S.Ct. 840, 78 L. Ed. 1434(1934)]". *United States v. Winstar*, 518 U.S. 839, 895, 116 S.Ct. 2432, 135 L. Ed.2d 964(1996)(Per Souter, J., with three Justices concurring and three Justices concurring in the judgment). Concerning a government contract, "a contracting officer has authority to modify a contract if he or she believes such modification is in the *best interest of the government* for a variety of reasons". *Thomas Creek Lumber v. United States*, 36 Fed. Cl. 220, 243(U.S. Court of Federal Claims, 1996)(emphasis added).

A "constructive *waiver* ... occurs not where the contract is ambiguous, but, rather where the government 'has administered an initially

that the petitioner had not completed all the rehabilitation work and the petitioner had actually told one of them that he had not completed the work. *Record*, #22, pp. 181-182, 304, 305, *Record*, #23, pp. 335-336, 339, 342, 345-347, 370.

It was apparent from the trial court's own observation that the local HUD officials who signed the contract containing the petitioner's statement about work completion knew that the rents that they were paying under the contract were very fair even if all the rehabilitation work which the petitioner allegedly falsely stated had been completed had not been completed. The court observed that the actual amount of rehabilitation under the contract to be performed was $77,000.00 not $88,000.00 and that the petitioner had completed roughly $55,000.00 of the promised $77,000.00 in rehabilitation work. *Record*, #29, p. 5. More importantly the court agreed that the units the petitioner provided under the contract were very good, decent and comfortable at a time when there was a dire need of housing, and the court further noted that one local HUD official had informed the court that "prices for housing in the City of Bridgeport have increased considerably. It is almost impossible to find a unit with modern facilities and constructed within the past ten years for the amount we pay" for the petitioner's units. *Record*, #29, pp. 5, 8, *Record*, #30, pp. 47, 43-44. The petitioner had testified to the uncontested fact that he had spent $600,000.00 of his own money rehabilitating the building within two years prior to the time of the government contracts. *Record*, #25, pp. 732-733, *Record*, #27, p. 1149. The rehabilitation under the

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unambiguous contract in such a way as to give a reasonably intelligent and alert opposite party the impression that a contract requirement has been suspended or waived.' " *Hannon Electric Co. v. United States*, 31 Fed. Cl. 135, 147 (U.S. Court of Federal Claims, 1994)(emphasis added). The elements of an election to waive a default in a contract are "(1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent." *DeVito v. United States*, 413 F.2d 1147, 1154 (U.S. Court of Claims, 1969).

contract was paid for with the petitioner's money and not with any government money or government loans.

It was not unusual for the government to waive the parts of the contract involving work completion. Concerning the program involved in the petitioner's case, a national audit conducted by HUD revealed that "waivers became commonplace." See petitioner's Supplemental Appendix submitted to the Second Circuit in *Mandanici II*, p. 5a, Audit of Section 8 Moderate Rehabilitation Program, Office of Inspector General, HUD, John J. Connors, Assistant Inspector General, Audit Case Number 89-TS-103-0005, April 26, 1989, p. 16. [5]

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[5] That 1989 HUD audit of the Moderate Rehabilitation Program, which was the program involving the petitioner's contract, stated that there were "inconsistencies" in the program and "most program managers and program participants became confused over their roles and responsibilities." Audit, p. 14, Supplemental Appendix to the Second Circuit, p. 3a. The auditors stated that

> "current practices by program managers and program participants resulted in wholesale noncompliance with MRP[Moderate Rehabilitation Program] regulations or other written guidance. Rule changes were made to keep pace with the programmatic changes dictated by management. *The need for regulatory waivers became commonplace.* The only revisions made to the 1979 regulations occurred in 1982. These changes were based on the experiences of the PHA's [local public housing agencies] administering the MRP and resulted in simpler, less detailed requirements and more flexibility for PHA's. The general thrust of the revised regulations was to bring the requirements closer in line with those governing the Section 8 Existing Program[where no rehabilitation was required]. Handbooks and other written guidance were similarly not revised to provide clear instructions to HUD program managers and PHA staffs as actual program operations shifted. A key element in any system of internal controls is the establishment of clear policies and related guidelines and instructions for carrying out the policies. Currently, the MRP is lacking that element. HUD needs to decide whether the MRP should be used as originally designed or should be used as it is currently practiced." Audit, p. 16, Supplemental Appendix, p. 5a (emphasis added).

Such waivers were in accord with the trial court's observations during the trial that the government contracts in the petitioner's case "were very flexible....[,] extremely flexible" and called for a "working relationship between owners of buildings" and HUD. *Record*, #27, pp. 1164, 1166.

Even after the petitioner's conviction, the government did not feel cheated and actually refused the petitioner's offer to rescind the contracts because there was no other available housing. In a letter dated November 21, 1983 from the petitioner's attorney to HUD officials, the petitioner offered to rescind the contract and offered the government 6 more months to provide other housing for the Section 8 tenants. See Appendix submitted in *Mandanici II*, pp. 112a-113a. Although HUD never formally responded to that offer, an internal HUD Memorandum by John P. Kennedy, Associate General Counsel, distributed a few weeks later on December 1, 1983, actually reveals that HUD feared that the petitioner would seek to void the contract and said Memorandum contains the legal advise that HUD officials "should take no action that would enable Mr. Mandanici to argue that the [HUD] contract had been breached by HUD and that he could, accordingly, evict the remaining Section 8 tenants". *Id.*, 114a.

The reasons for HUD's actions are contained in an earlier internal HUD Memorandum by Philip Abrams, the Assistant Secretary of HUD in Washington, dated October 13, 1983, which refers to the initial desire to terminate the petitioner's contract due to his conviction but then states that the petitioner's contract should not be terminated since

> "it does not appear that any consideration has been given as to whether other housing resources are easily and readily available in other locations within Bridgeport .... Considering the above circumstances, I do not believe that cancellation of the [petitioner's] contract at this time is in the *best interest of the government* and you [lower HUD officials] are hereby directed to take no such action without the approval of this office." (emphasis added). Id., 101a.

Thus the statements about work completion were not material because the government knew that all the work had not been completed and waived the provisions of the contract concerning work completion due to the housing shortage and the fact that the government was getting Cadillac quality housing for the price of a Ford. The government did not lose a dime. The respondent has never really addressed the petitioner's claim that the statements were not material because the matters concerning work completion were waived. Furthermore, the petitioner is claiming that he was actually innocent since the statements were not material.[6]

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[6] Although the Second Circuit's opinion in *Mandanici II* did not rest on the underlying facts of the case, it should be noted that the court erred when it stated that the petitioner "was required, *inter alia*, to complete and file a number of documents.... In 1982, [he] was indicted ... on three counts of making false statements in those documents, in violation of 18 U.S.C., Sec. 1001". *Mandanici II* at 521, App. 5a. As mentioned above the Indictment did not charge the petitioner with making false statements in the documents he supplied but for statements contained in form government contracts drafted by the government and signed by the petitioner. See Count Two and Count Three in the Indictment in the Appendix submitted to the Second Circuit as part of the petitioner's appeal in *Mandanici II*, 14a-16a; Govt. trial exhibits #3, 3A (AHAP contract); and Govt. trial exhibit #4(HAP contract).

Also, in the concurring opinion of Kearse, J., in *Mandanici II*, *supra*, 532, App. 25a-26a, the court quoted findings by the Second Circuit in the petitioner's original appeal in *Mandanici I* but did not mention that in the earlier direct appeal the court viewed the evidence "in the light most favorable to the government". *See Mandanici I*, 729 F. 2d at 919. The concurring opinion in *Mandanici II* refused to mention facts contained in the record favorable to the petitioner and cited by him in his Brief, pp. 7-9, 21, and Reply Brief, pp.5-8, submitted to the Second Circuit concerning that appeal. The concurring opinion did not refer to any of the facts mentioned above concerning the petitioner's statements to the officials that the work was not completed and their knowledge of that fact, nor did the opinion mention the housing shortage and why the housing officials would waive the provisions concerning work completion, nor did the opinion mention the government's rejection of the petitioner's request after his trial to cancel the contracts. Also, the petitioner stressed in his briefs to the Second Circuit in *Mandanici II* that the court should not rely on the summary of the facts contained in its decision concerning the petitioner's

H. Argument

The Court should decide the question left open in *Tyler v. Cain*, *supra*, and rule that the reasonable doubt standard is of sufficient importance in the criminal justice system to warrant retroactive application of new cases that identify situations where that constitutionally required standard was not used.

1. The Minority Opinion That Addressed The Merits In *Tyler v. Cain* Should Be Adopted

This Court in *Tyler v. Cain* ruled that a petitioner who files a second or successive habeas corpus petition after the enactment of AEDPA can not rely on a new case as grounds for relief unless the Supreme Court itself had *already* clearly held, as required in the AEDPA statute, that such a new case should be applied retroactively in habeas corpus cases. *Tyler v. Cain*, *supra*, 121 S.Ct. 2478. The petitioner in *Tyler v. Cain* had argued that new cases identifying situations where a defective reasonable doubt standard was used, such as *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339

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earlier direct appeal because that appeal concerned the sufficiency of the evidence regarding falsity and not materiality, and the court viewed the evidence in the light most favorable to the government and missed many things favorable to the petitioner on the issue of materiality.

Concerning disregarding certain evidence, the Second Circuit in the earlier 1984 appeal in *Mandanici I* referred to an Undated Letter that stated that the work was completed, but the court did not mention the fact that the official who received that letter testified that the petitioner kept the original and only gave him a copy of the undated letter. *Record*, #23, p. 340. If the Second Circuit had mentioned that the petitioner had kept the original, then that would have weakened the government's case that the petitioner had told the official to whom he gave the letter that the attachments were paid receipts for work done. Keeping the original strengthened the petitioner's testimony that the undated letter was merely a draft and the attachments were estimates of the work he would perform.

(1990), and *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182(1993), should be applied retroactively in habeas corpus cases, and Tyler further argued that if the Court stated that it had not already ruled that such cases should be applied retroactively then the Court should issue such a ruling in its decision. *Tyler v. Cain*, *supra*, 121 S.Ct. 2480, 2483, 2485. The Court stated that it had not previously ruled that such cases should be applied retroactively and refused to decide whether such cases involving the reasonable doubt standard "should" be applied retroactively because the controlling issue in the case under AEDPA was whether the Supreme Court itself had *already* in a previous case held that such cases should be applied retroactively. *Id.*, 2483-2485. "We cannot decide today whether *Cage* is retroactive to cases on collateral review, because that decision would not help Tyler in this case. Any statement on *Cage's* retroactivity would be dictum, so we decline to comment further on the issue." *Id.*, 2485. Justice Breyer in a minority opinion joined by three other justices stated that new cases identifying situations where a defective reasonable doubt standard was used should be applied retroactively in collateral relief cases. *Id.*, 2486-2490 (Breyer, J., dissenting).

This Court should grant certiorari because as noted in Rule 10(c) certiorari is appropriate when a lower court "has decided an important question of federal law that has not been, but should be, settled by this Court ..." Obviously the question of whether new cases involving the reasonable doubt standard should be applied retroactively in collateral relief cases is an important issue or else this Court would not have granted certiorari in *Tyler* nor would the minority opinion have addressed the merits of the issue.

Justice Breyer suggested that the Court could grant certiorari in "some other case" that concerns the issue but not burdened by AEDPA's restrictions. *Id.*, 2490. The present case is such a case in which the issue can be decided since it is not an AEDPA case. Even assuming that any restriction that applies to habeas corpus petitions also applies to coram nobis

petitions, such restrictions imposed by AEDPA do not apply because the petitioner filed his petition for writ of coram nobis in the District Court in 1995 prior to the enactment of AEDPA in 1996. *Mandanici II*, *supra*, 205 F.3d at 524, n.9, App. 8a, n.9. *See Slack v. McDaniel*, 529 U.S. 473, 481, 120 S.Ct. 1595, 146 L. Ed. 2d 542(2000)("a court of appeals [is required] to apply pre-AEDPA law in reviewing the trial court's ruling, for cases commenced there [in a district court] pre-AEDPA").

Thus this Court now has the opportunity to consider adopting the minority opinion in *Tyler v. Cain* where Justice Breyer, joined by three other justices, presented powerful arguments supporting the view that cases identifying situations where a defective reasonable doubt standard was used should be applied retroactively, and he cited *Gaines v. Kelly* as authority. *Tyler v. Cain*, *supra*, 121 S.Ct. at 2486-2490(Breyer, J., dissenting).

It is important to note that although the *Tyler* and *Gaines* cases concern defective reasonable doubt instructions that would allow a jury to convict on a standard of proof less than the reasonable doubt standard and *Mandanici II* concerns a situation where the fact finder actually used a standard of proof less than beyond a reasonable doubt, the issues are constitutionally the same because in both situations the constitutional right to a fact finder using the reasonable doubt standard has been violated. It could be argued that the petitioner's situation is far more egregious since the Second Circuit actually ruled that the reasonable doubt standard was not used but it was only likely in *Tyler* and *Gaines* that it was not used.

Although Justice Breyer stated that this Court in the past had made *Cage* retroactive and he never stated that cases like *Cage* should be applied retroactively, his arguments strongly support the view that cases such as *Cage* identifying situations where a defective reasonable doubt standard was used should be applied retroactively. It would be irrational to contend that prior Supreme Court cases held *Cage* to be

retroactive and then contend that such prior cases do not support the view that *Cage* should be held retroactive. By contrast, not only did the majority refuse to decide whether such cases should be applied retroactively, but the majority's arguments were based on a strict interpretation of AEDPA and that statute's needle's eye limitation as to what cases can be used as precedent. Under AEDPA, the only relevant previous ruling is a holding by the Supreme Court itself while under general jurisprudence the rationales behind decisions from all types of courts are considered as potential precedents.

More specifically in *Tyler*, Justice Breyer stated that the *Cage* case identifying a defective reasonable doubt standard satisfied the second exception in *Teague v. Lane*, *supra*, 489 U.S. 288, that allowed for retroactive application. *Tyler v. Cain*, *supra*, 121 S.Ct. at 2487(Breyer, J., dissenting). That exception involved new cases that alter our understanding of the bedrock procedural elements of a fair trial and improve accuracy. *Id.*[7] Justice Breyer opined that this Court in the past had concluded that a jury instruction that "misdescib[es] the concept of reasonable doubt vitiates *all* the jury's findings and deprives a criminal defendant of a basic protection without which a criminal trial cannot reliably serve its function", and "renders the situation as if there has been *no jury verdict* ..." *Id.* (internal citation and citation marks omitted, first emphasis in original, second emphasis added).[8]

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[7] The first exception concerns "new rules that place an entire category of primary conduct beyond the reach of the criminal law". *Sawyer v. Smith*, 497 U.S. 227, 241, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

[8] Although not mentioned by Justice Breyer, in the case of *In Re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L.Ed.2d. 368 (1970), this Court stated that the reasonable doubt standard is "a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law." The Court rejected the "suggestion that there is ... only a 'tenuous difference' between the reasonable doubt and preponderance standards. The suggestion is

Justice Breyer actually stated that "*every Court of Appeals* to have considered the matter has concluded" that the *Cage* and *Sullivan* cases involving the reasonable doubt standard satisfy the second exception of *Teague* allowing for retroactive application. *Tyler v. Cain*, *supra*, 121 S.Ct. at 2487(emphasis added). Justice Breyer actually cited *Gaines v. Kelly* as one of the cases from the circuits that have considered the matter and have ruled that new cases involving the reasonable doubt standard should be applied retroactively in collateral relief cases. *Tyler v. Cain*, *supra*, 121 S.Ct. at 2487.

Justice Breyer stated that as a matter of "logic" and analysis of prior Supreme Court cases, the Court had ruled that such cases involving the reasonable doubt standard should be applied retroactively. *Id.*, 2488. The majority based its ruling *not* on whether the "reasoning" or "principles outlined in *Teague* ... *should* make *Cage* retroactive" but whether the Court itself had "made *Cage* retroactive". *Id.* 2484(emphasis in original). The majority refused to decide whether it "should make" such cases involving the reasonable doubt standard "retroactive", ruling that "[a]ny statement on *Cage's*

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singularly unpersuasive.... [because the preponderance of evidence standard merely requires] an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing [the factfinder] ... of the truth of the proposition asserted." *Supra*, 367-368(internal citation and citation marks omitted).

This Court has held that the "*Teague* doctrine is founded on the notion that one of the principal functions of habeas corpus is to assure that no man has been incarcerated under a procedure which creates an impermissibly *large risk* that the innocent will be convicted" and "unless a new rule of criminal procedure is of such a nature that without it the likelihood of an accurate conviction is seriously diminished" then the courts should not apply the rule retroactively on habeas review. *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L. Ed.2d 828 (1998) (internal citation and citation marks omitted, emphasis added). Assuming that the preponderance of the evidence means 51% of the evidence, then surely a conviction in which there is a 49% chance that the defendant was innocent is the type of "large risk" scenario that this Court stated satisfied *Teague's* rules regarding retroactivity.

retroactivity would be dictum" because the controlling issue was whether the Court had already made such a ruling, and "so we decline to comment further on the issue." *Id.* 2485. Thus the majority left unchallenged Justice Breyer's contention that the logic of prior cases at the very least supported the view that new cases involving the reasonable doubt standard should be applied retroactively in collateral relief cases. Under Rule 10(c), this is an important federal question and thus this Court should grant certiorari to settle the merits of Justice Breyer's claims.

2. The Second Circuit's Opinion In *Mandanici II* Not Only Conflicts With The Minority Opinion In *Tyler v. Cain* But Also With A Controlling Precedent In The Second Circuit And Cases From Six Other Circuits

Concerning the Second Circuit's decision in *Mandanici II*, the court found as a fact that the jury did not decide the issue of the materiality of the statements but rather the trial court made that determination using the civil standard of proof by a preponderance of the evidence. *Mandanici II* at 526, 531, App. 14a, 23a-24a. However, although the court stated that the use of such a standard violated the petitioner's constitutional right of due process, the court held that the *Gaudin* and *Ali* cases could not be applied retroactively in the present collateral relief case because such new cases involving the reasonable doubt standard did not meet the requirements of *Teague v. Lane*, *supra*, 489 U.S. 288. *Mandanici II* at 528-531, App. 18a-25a.

The Second Circuit in *Mandanici II* held that the first exception of *Teague* was not involved but that the "question is a close one" regarding the second exception of *Teague* concerning new "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Mandanici II* at 528, App. 18a. The court held that the constitutionally mandated reasonable doubt standard did not meet the second exception of *Teague* because

that constitutional requirement did not have the "primacy and centrality" of other rules such as the right to counsel under *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed.2d 799(1963). *Mandanici II* at 529, 531, App. 19a, 23a.[9]

However, that opinion clearly conflicts with the earlier opinion of the Second Circuit in *Gaines*, which was a controlling precedent because it was released earlier. *See* note 2, *ante*, at 5-6.

Regarding whether new cases involving the reasonable doubt standard meet the *Teague* exceptions allowing for the retroactive application, the Second Circuit in *Gaines* concluded that such cases meet the second exception. *Gaines*, *supra*, 202 F.3d at 604-605. In *Gaines*, the Second Court held that the reasonable doubt standard "plays a *pivotal role* in ensuring the accuracy" of a trial and "[b]ecause any criminal conviction rendered pursuant to an unconstitutional definition of reasonable doubt is necessarily unfair, *see Teague*, 489 U.S. at 315, ... we conclude that ... [new cases describing situations where defective reasonable doubt instructions were used] fall... within the second exception to the *Teague* doctrine." *Gaines v. Kelly*, *supra*, 202 F.3d at 604-605

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[9] In addition to its comments that the reasonable doubt standard lacked a "primacy and centrality", the Second Circuit stated that under the principles set forth in *O'Dell v. Netherland*, 521 U.S. 151, 167, 117 S.Ct. 1969, 138 L.Ed.2d 351(1997) one of the *Teague* conditions is that for a new case to be retroactive it must not concern a "'narrow right' that applies only to a 'limited class' of cases." *Mandanici II* at 528, 531, App. 19a, 23a. The court stated that the new cases requiring materiality to be proven beyond a reasonable doubt only affected a subset of cases in a few circuits and thus did not qualify for retroactive application. *Mandanici II* at 531, App. 23a. But this Court in *O'Dell* just noted that the right it was considering only affected a limited class of cases and this could "hardly alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.*, 167(internal citation and citation marks omitted). Thus if a right applies to only a limited number of cases but that right concerns a bedrock principle then the new case can be applied retroactively. The reasonable doubt standard is such a bedrock right. Also, the number of cases involving the false statement statute in the Second Circuit prior to *Gaudin* and *Ali* are numerous.

(emphasis added). The Second Circuit held that concerning the question of whether the reasonable doubt standard is a watershed rule of criminal procedure, this Court has

> "cited *Gideon v. Wainwright*, [*supra*] ... as an example of the sort of rule falling within the second *Teague* exception. *See Saffle [v. Parks]*, 494 U.S. [484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).... *Gideon* established an affirmative right to counsel in felony cases. *The right to accuracy in instructions defining reasonable doubt resembles the right to counsel [in Gideon, supra,] in that both rights are fundamental to the fairness of the criminal proceeding.* As the Court explained in *Sullivan*, 'the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt,' 508 U.S. at 278, 113 S.Ct. 2078, meaning that where a jury instruction defining a reasonable doubt is constitutionally deficient, 'there is no jury verdict within the meaning of the Sixth Amendment,' *id.* at 280". *Gaines*, *supra*, at 604 (emphasis added).

The conflict is obvious in that the Second Circuit in *Mandanici II* at 531, App. 23a, stated that the reasonable doubt standard lacked a "primacy and centrality" in the criminal justice system while the Second Circuit in *Gaines* stated that it played a "pivotal role". *Gaines*, *supra* at 604. The Second Circuit in *Mandanici II*, *supra* at 529, 531, App. 19a, 23a, stated that the reasonable doubt standard was not as important as the right to counsel set forth in *Gideon* while the Second Circuit in *Gaines* stated that the reasonable doubt standard was as important as the right to counsel set forth in *Gideon*. *Gaines*, *supra* at 604.[10]

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10 In reality, the reasonable doubt standard is far more important than the right to counsel as evidenced by the fact that defendants occasionally waive the right to counsel and go pro se, just as they waive the right to a jury trial and have a court trial, but it is highly unlikely that a defendant would waive the right to the reasonable doubt standard.

Mandanici II not only conflicts with an earlier and controlling Second Circuit precedent but with cases from six other circuits. The Eleventh Circuit in *United States v. Swindall*, 107 F.3d 831(11th Cir., 1997), addressed the issue of whether *Gaudin* should be retroactively applied in coram nobis cases where the trial judge had used a lower standard of proof than proof beyond a reasonable doubt. The court in *Swindall*, *supra* at 836, held that in most *Gaudin* type situations where the only issue concerns who decided materiality, then *Gaudin* is not retroactive, but noted that in the case before it the appellant was not asserting the claim that

> "the judge used a less exacting standard than 'beyond a reasonable doubt' in its determination that the false statements were material, *which would implicate the accuracy of the materiality finding. See Gaudin*, [*supra*, 515 U.S. at 510] n. 1 ... noting that some courts which regard materiality as a legal question for the judge do not require [the] beyond a reasonable doubt burden of proof...". *Swindall*, *supra*, 836(emphasis added).

The court further stated that the *Cage* rule prohibiting watered down reasonable doubt instructions

> "implicated the *accuracy* of a conviction because the 'beyond a reasonable doubt' standard guards against *conviction of the innocent. Nutter[v. White*, 39 F.3d 1154, 1157(11th Circuit, 1994)]. When a jury convicts under an incorrect reasonable doubt instruction, it may mistakenly convict an innocent defendant. By contrast, 'the harm to be corrected by *Gaudin* [in most Circuits] was not the *inaccuracy* of the decision; rather, the problem to be corrected was that the wrong entity was making the decision'.... The fact that the *Gaudin* rule [usually] does not improve the accuracy of the trial is sufficient to render *Teague's* second exception inapplicable". *Swindall* at 836 (emphasis added).

Thus the Eleventh Circuit clearly implied that *Gaudin* is retroactive in the Circuits where the standard used by the trial judge was lower than proof beyond a reasonable doubt because in that situation the problem was not just who decided materiality but that the lower standard of proof "implicated the accuracy of a conviction".

In *Nutter v. White*, *supra* at 1157-1158, the Eleventh Circuit specifically held that the *Cage* case met the second exception under *Teague* concerning new rules that "relate to the *accuracy of the conviction* ... and ... alter our understanding of the bedrock procedural elements essential to the fundamental fairness of a proceeding." (emphasis added). The Court in *Nutter* stated that

> "[t]he *Cage* rule meets the *accuracy prong [of Teague]. The reasonable doubt standard guards against the conviction of the innocent by ensuring the systemic accuracy of the criminal system. Sullivan [v. Louisiana, supra,]* ... [holds that a] jury verdict of guilt beyond a reasonable doubt is a 'basic protection' whose precise effects are unmeasurable'.... *Cage* also satisfies the fundamental fairness prong of *Teague's* second exception. The Supreme Court typically offers the right to counsel, as announced in *Gideon v. Wainwright*, [*supra*, 372 U.S. 335], as the paradigm of a 'bedrock procedural element' falling within the second exception... Like *Gideon*, *Cage* implicates a fundamental guarantee of trial procedure because use of a lower standard of proof frustrates the jury trial guarantee... Unlike other new rules, an inadequate reasonable doubt instruction cannot be cured by other circumstances at trial. Thus, an improper reasonable doubt instruction undermines the fundamental fairness of every trial in which it is used.... *Sullivan* tells us that 'no judicial determination' is precisely the consequence of *Cage* error." *Nutter*, *supra*, 39 F.3d at 1157-1158.

The Fourth Circuit in *Adams v. Aiken*, 41 F.3d 175(4th Cir., 1994), addressed the issue of whether the case of *Sullivan v. Louisiana*, *supra*, which held that a constitutionally defective reasonable doubt instruction can not be considered harmless, should be applied retroactively in a collateral relief case. The Fourth Circuit held that

> "in light of *Sullivan*[, *supra*], a constitutionally deficient reasonable doubt instruction not only dilutes the standard of proof beyond a reasonable doubt mandated by *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), but it also *prevents a jury verdict of guilty from coming into existence*. This failure is a breach of the right to a trial by jury, resulting in a *lack of accuracy and the denial of a bedrock procedural element essential to fairness....* Consequently, the rule that a constitutionally deficient *reasonable doubt instruction* violates the Due Process clause satisfies *Teague's second exception. It should be applied retroactively*." *Adams v. Aiken*, *supra*, 41 F.3d at 178-179 (emphasis added).[11]

The Ninth Circuit in *Nevius v. Sumner*, 105 F.3d 453, 462(9th Cir., 1996), the Tenth Circuit in *Tillman v. Cook*, 215 F.3d 1116 (10th Cir. 2000), the Third Circuit in *West v. Vaughn*, 204 F.3d 53 (3rd Cir. 2000), and the Fifth Circuit in *Humphrey v. Cain*, 138 F.3d 552(5th Cir., 1998)(adopting the opinion of the panel below at 120 F.3d 526, 529) similarly held that cases such as the *Sullivan* and *Cage* cases which identify unconstitutional reasonable doubt instructions should be applied retroactively in collateral relief cases.

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[11] The decision in *Adams* was a result of the action of this Court granting the defendant's petition for writ of certiorari and ordering "the judgment vacated and [the] case remanded [to the United States Court of Appeals for the Fourth Circuit] for further consideration in light of *Sullivan v. Louisiana*, [*supra*]" *Adams v. Evatt*, 511 U.S. 1001, 114 S. Ct. 1365, 128 L. Ed.2d 42(1994). *See Adams v. Aiken*, *supra*, 41 F.3d at 176.

The Second Circuit in its decision, *Mandanici II* at 527, n.15, 530, App. 16a, n.15, 21a, did refer to the *Swindall* and *Nutter* cases from the Eleventh Circuit but did not mention the *Adams* case from the Fourth Circuit, the *Humphrey* case from the Fifth Circuit, nor the *Nevius* case from the Ninth Circuit. The other cases were decided later.

Thus this Court should grant certiorari in the present case in accord with Rule 10(a) to resolve a conflict between the Second Circuit and other circuits as to the importance of the reasonable doubt standard. The opinions from four other circuits were not affected by the *Tyler* case since they did not involve cases covered by AEDPA.[12]

3. Law Concerning Modifying Prior Decisions

The petitioner's Motion To Recall And Modify The Court's Mandate And Decision was certainly an appropriate procedure for raising the present issue. "The courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." *Calderon v. Thompson*, 523 U.S. 538, 549, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). The Second Circuit's Local Rule 27(c) also provides for such motions. *See ante*, at 2.

In a case in which a party filed a "motion to recall and modify" a mandate four months after the Second Circuit denied that party's motion for rehearing, the court granted that motion in part, stating that our

> "power to recall a mandate is unquestioned.... [W]e ... have the *power to reopen a case at any time*. However, this power is to be exercised sparingly, and reserved for exceptional circumstances.... [such as an] *supervening change in governing law* that calls into serious question the correctness of the court's judgment." *Sargent v. Colombia Forest Products,*

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[12] The cases not involving AEDPA because the petitions were filed prior to the enactment of AEDPA are *Adams v. Aiken*, *supra*, *Nutter v. White*, *supra*, *Tillman v. Cook*, *supra*, and *Humphrey v. Cain*, *supra*.

Inc., 75 F.3d 86, 89-90(2nd Cir. 1996)(internal citations and citation marks omitted, emphasis added).[13]

The Second Circuit has also held that the "[w]e ... have authority to *revise* our prior rulings." *N.L.R.B. v. Coca-Cola Bottling Co. Of Buffalo*, 55 F.3d 74, 77(2nd Cir. 1995)(emphasis added).

> "Although the district court may not change our minds for us, we may ourselves do so. The federal doctrine of law of the case merely expresses the practice of federal courts generally to refuse to reopen what has been decided, not a limit to their power. The doctrine embodies a salutary rule of practice that when a federal appellate court has established a rule of law for the case at bar it will not, on a successive appeal, depart therefrom in deciding the same issues, except for *cogent reasons*. In brief, the doctrine does not rigidly bind the appellate court, but is addressed to its good sense, and the court will depart from its prior legal announcements when the *circumstances of the case warrant*." *United States v. Fernandez*, 506 F.2d 1200, 1203(2nd Cir. 1974)(internal citation and citation marks omitted, emphasis added).

The Tenth Circuit in referring to a more recent decision of this Court concerning the same land in question, stated that "we conclude that modification of our earlier judgment is appropriate, not merely because the two decisions are incongruent, but because of the *effect of the incongruency on the interest of uniformity and the integrity of our system of judicial decisionmaking*." *Ute Indian Tribe of Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513, 1527 (10th Cir. 1997)(emphasis added). "[I]t is within the inherent power of

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[13] Other cases hold that a change in the law is an appropriate reason for a court to recall and modify its mandate. *See Scott v. Singletary*, 38 F.3d 1547, 1551 (11th Cir. 1994); *McGeshick v. Choucair*, 72 F.3d 62, 63 (7th Cir. 1995).

the court to recall its mandate in order to protect the integrity of its own processes ..." *United States v. Holland*, 1 F.3d 454, 455 (7th Cir. 1993).

One such exceptional circumstance or cogent reason surely would be when a court learns that there was an incongruent but controlling precedent released a few weeks prior to its decision. The incongruency certainly affects the integrity of the judicial system.

Motions to modify decisions or mandates are similar to motions to reargue that although filed beyond the required time period can be allowed. The Second Circuit has allowed extensions to file petitions for rehearing even after the 14-day period for filing such petitions elapsed. *See Davis v. Smith*, 607 F.2d 535, 541(2nd Cir. 1978)(Timbers, J., dissenting). In *Davis*, the party who moved for permission to file late a petition for rehearing and who actually received that permission, never actually filed the petition for rehearing. *Id.* However, the court still "recall[ed]" its earlier decision and remanded the case to the district court "for further consideration in light of" a Supreme Court case which had been rendered more than two months prior to the court's original decision. *Id.*, 540, 541. The court stated when it remanded the case to the district court that it was "express[ing] no view" as to how the district court should interpret the Supreme Court case. *Id.*, 540. Thus in *Davis*, no party actually filed a petition for rehearing but the court recalled its earlier decision upon learning of a case which was in existence two months prior to that original decision. Later in another case, the court noted that its action in "*Davis* was predicted on a *mistake of law at the time of the original decision*." *Marino v. Ortiz*, 888 F.2d 12, 13(2nd Cir. 1989)(emphasis added).

A recent example of the Second Circuit amending a decision, without apparently any petition for rehearing or rehearing *en banc* having been granted, is *Washington v. Schriver (Washington I)*, 240 F.3d 101(2nd Cir. 2001) which the court decided on January 5, 2001, and then, as noted in the

published decision, amended on February 14, 2001. However, later on June 15, 2001, the court again amended its decision without noting that any rehearing was granted, and that amendment was substantial. *See Washington v. Schriver(Washington II)*, 255 F.3d 45 (2nd Cir. 2001).[14] The court amended its decision in *Washington I* to the extent of

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[14] The earlier published decision of February 14, 2001, noted that under the AEDPA statute, a federal court in considering a state prisoner's habeas corpus claim could only overrule the state court's decision on a federal constitutional issue if it found that the state court's decision was an "unreasonable application of ... clearly established Federal law". *Washington I, supra*, 240 F.3d at 107. However, the court then ruled that when a state court does not make any reference to federal case law when deciding that federal constitutional issue, then no deference is due that decision and pre AEDPA law applies allowing a federal court to decide that issue *de novo* . *Id.*, 109-110. More specifically, the court stated that "*[w]e agree"* that the "pre-AEDPA standards" apply. *Id.* 107 (emphasis added). "Because the petitioner's due process claim was not adjudicated on the merits, *we apply the pre-AEDPA standard of review*. Pure questions of law and mixed questions of law and fact will be reviewed *de novo*." *Id.*, 110 (emphasis added). In the amended opinion of June 15, 2001, the majority opinion of the court without any apparent reference to the earlier decision noted for the first time that there was a split in the circuits on the issue and that "[w]e *need not and do not resolve today the question of whether [AEDPA's stricter] standard of review applies* because nothing turns on it here. Indeed as we discussed below, even reviewing the state court's resolution of Washington's federal constitutional claim *de novo*, ... we hold that the district court properly denied the petitioner's application for a writ of habeas corpus." *Washington II, supra*, 255 F.3d at 53, 55 (emphasis added). The amended opinion even adds a 4 page concurring opinion that was not part of the original decision. *Id.*, 61-65 (Calabresi, J., concurring). In that concurring opinion, Judge Calabresi refers to the earlier decision and notes that in "order to address what is an undoubtedly difficult question, we would need the benefit of additional full and careful briefing and argument on the proper application of AEDPA deference in the absence of a State court signal.... Under the circumstances, we have no choice but to allow the issue of the correct interpretation of the AEDPA to await a decision by a future panel." *Id.*, 65. Thus it appears that the court substantially amended its earlier decision to the extent of actually withdrawing that decision because the court learned of a split in the circuits on the issue and would need fuller and more careful briefing on the issue to decide which circuit to follow.

actually withdrawing its earlier explicit ruling. It appears that the reason for the amendment was that the court learned for the first time that there was a split in the circuits on the issue and the court would need more extensive briefing to actually decide whether its first ruling was correct and which other circuit it should follow. In the present case, the Second Circuit should have amended its decision not because it learned about a split in the other circuits but because it learned that there was a split in *its own* circuit and the law concerning precedents mandates that the other decision was controlling since it predated *Mandanici II*.

If this Court grants certiorari, the standard of review is whether the Second Circuit abused its discretion in denying the petitioner's Motion To Recall. *Calderon v. Thompson*, *supra*, 523 U.S. at 549. An abuse of discretion occurs if a "court's findings rest on an erroneous view of the law ..." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). A "court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

A "court necessarily abuses its discretion if it bases its decision on an erroneous view of *controlling law*. *See Cooter & Gell v. Hartmarx Corp.*, [*supra*]." *Stokors S.A. v. Morrison*, 147 F.3d 759, 761 (8th Cir. 1998)(emphasis added). A "court abuses its discretion if it does not apply the correct law ..." *Bateman v. United States Postal Service*, 231 F.3d 1220, 1223 (9th Cir. 2000). "A court abuses its discretion ... when it misapplies the law." *Florida Association Of Rehabilitation Facilities, Inc. v. Florida Department Of Health*, 225 F.3d 1208, 1218 (11th Cir. 2000).

The *Gaines* decision was the controlling law, *see* note 2, *ante*, at 5-6, and thus the Second Circuit by definition abused its discretion in failing to apply that controlling law. The Second Circuit also abused its discretion by failing to address that controlling precedent in its denial of the Motion To Recall.

4. Conclusion

Therefore, this Court should grant certiorari because the important issue addressed by Justice Breyer in *Tyler v. Cain* concerning the vital role of the reasonable doubt standard should now be settled. Since the present case is a non-AEDPA case, this is the "some other case" that Justice Breyer mentioned by which this Court could clearly state that new cases identifying situations where the constitutionally required reasonable doubt standard was not used are to be applied retroactively in collateral relief cases. *See Tyler v. Cain, supra*, at 2490 (Breyer, J., dissenting). Also, the Second Circuit's opinion in *Mandanici II* not only conflicts with the controlling *Gaines* opinion from the Second Circuit but with opinions from six other circuits, four of which, like *Gaines*, did not involve AEDPA cases.[15]

The Petitioner John C. Mandanici, Jr.
By Richard Emanuel
Counsel Of Record
601 Plymouth Colony
Branford, Ct. 06405
(203) 488-1040

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[15] The ultimate relief that the petitioner seeks is not necessarily that a new jury apply the reasonable doubt standard but for a court to review the record and apply the reasonable doubt standard concerning the element of materiality. When a court finds that a jury did not decide an element of an offense, a reviewing court can review the evidence on its own and apply the reasonable doubt standard. *Neder v. United States*, 527 U.S. 1, 15-21,119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). "[W]here a reviewing court concludes *beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error, the [error] ... is properly found to be harmless." *Id.*, 17 (emphasis added). The evidence in the petitioner's case is set forth, *ante*, at 7-14.

I. Appendix

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1. RULING OF THE SECOND CIRCUIT DENYING MOTION TO RECALL AND MODIFY THE COURT'S MANDATE AND DECISION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

V. Docket # 99-2059

JOHN C. MANDANICI, Jr. Motion To Recall And Modify The Court's Mandate And Decision

ORDER

Before: Hon. James L. Oakes, Hon. Amalya L. Kearse, Hon. Jose A. Cabranes, Circuit Judges.

IT IS HEREBY ORDERED that the motion be and hereby is **DENIED**.

Filed October 31, 2001

For the Court
ROSEANN B. MACKECHNIE,
Clerk

_____
By: Oliva M. George,
Deputy Clerk

2. RULING OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 1999
(Argued: September 22, 1999 Decided: FEB 23 2000
Docket No. 99-2059

UNITED STATES OF AMERICA,
Respondent-Appellee,
V.
JOHN C. MANDANICI, JR.,
Petitioner-Appellant.

Before: KEARSE, OAKES, and CABRANES, *Circuit Judges*

Appeal from a judgment of the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge),* entered December 4, 1998, denying petitioner appellant's petition for a writ of error *coram nobis.* On appeal, petitioner contends that his constitutional rights were violated at his 1983 trial for making false statements of fact in violation of 18 U.S.C., Sec. 1001 because the trial court made a finding of materiality based on a preponderance of the evidence rather than beyond a reasonable doubt, as required following the decisions in *United States v. Gaudin*, 515 U.S. 506(1995), and *United States v. Ali,* 68 F.3d 1468(2nd Cir. 1995).

Affirmed.

Judge Kearse concurs in the opinion and judgment of the Court, and files a concurring opinion.

BRIAN E. SPEARS, Assistant United States Attorney for the District of Connecticut (Stephen C. Robinson, United States Attorney for the District of Connecticut, *of counsel), for Respondent-Appellee.*

James J. RUANE, Bridgeport, CT, *for Petitioner-Appellant.*

Jose A. CABRANES, *Circuit Judge:*

The principal question presented, as a matter of first impression, is whether the change in the law of this Circuit following *United States v. Gaudin,* 515 U.S. 506 (1995), to require proof of materiality beyond a reasonable doubt for conviction under 18 U.S.C., Sec. 1001, applies retroactively on collateral review. Petitioner John C. Mandanici, Jr., appeals from a judgment of the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge),* entered December 4, 1998, denying his petition for a writ of error *coram nobis.*[1] Judge Thompson held that *Gaudin* does not apply retroactively insofar as the Supreme Court's decision changed the law to require that materiality be decided by a jury rather than the judge, but he did not address Mandanici's alternative argument concerning the standard of proof required for conviction after *Gaudin.* We hold that this latter change in law does not apply retroactively on collateral review, and therefore affirm the judgment of the District Court.

I.

The factual background of this case is described in detail in our opinion on direct appeal, *see United States v. Mandanici*, 729 F.2d 914 (2nd Cir. 1984), familiarity with which is assumed, and will be repeated here only to the extent necessary.

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[1]A District Court may issue a writ of error *coram nobis* pursuant to the All Writs Act, which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C., Sec. 1651 (a). *See generally United States v. Morgan*, 346 U.S. 502 (1954).

Mandanici owned an apartment building in Bridgeport, Connecticut, in the early 1980s, for which he sought and received rent subsidy benefits under a program funded by the United States Department of Housing and Urban Development ("HUD"). *See id.* at 915. To participate in the program, Mandanici was required, *inter alia*, to complete and file a number of documents with the Bridgeport Housing Authority, which administered the program locally on behalf of HUD. *See id.* at 915-16. In 1982, Mandanici was indicted by a federal grand jury sitting in the District of Connecticut on three counts of making false statements in these documents, in violation of 18 U.S.C., Sec. 1001,[2] and on a fourth count of making false statements to a federally insured bank, in violation of 18 U.S.C., Sec. 1014.[3] *See Mandanici*, 729 F.2d at 916 & n.2.

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[2] The version of Sec. 1001 in effect at the time of Mandanici's trial is quoted in the text below.

[3] At the time of Mandanici's trial, Sec. 1014 provided in relevant part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of ... [any one of several enumerated entities including] any institution the accounts of which are insured by the Federal Deposit Insurance Corporation ... upon any application, advance, discount, purchase, purchase agreement, repurchase agreeement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therfor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C., Sec. 1014(1976). Congress amended this provision in 1989, 1990, 1994, and 1996. *See* 18 U.S.C.A. Sec. 1014 historical and statutory notes (West Supp. 1999). For the purposes of this case, these amendments are not material.

In February and March 1983, Mandanici was tried before a jury, with Judge Robert C. Zampano, presiding. When Mandanici was tried, Sec. 1001 provided:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C., Sec. 1001 (1976).[4] By its plain terms, the provision established three separate offenses: (1) falsifying, concealing, or covering up by any trick, scheme, or device a material fact; (2) making a false, fictitious, or fraudulent statement; and (3) making or using a false writing or document.[5] A conviction under Sec. 1001 could be sustained if the jury found that the requirements of any one of these three offenses had been met.

At the time of Mandanici's trial, the law in this Circuit was that materiality was an element only of the first offense - namely, falsifying, concealing, or covering up by trick, scheme, or device a *material* fact. *See, eg., United States v.*

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[4] Congress amended Sec. 1001 slightly in 1994, see Pub. L. No. 103-322, Sec. 330016(1)(L), 108 Stat. 2147, 2147 (1994), and enacted a wholesale revision in 1996, *see* Pub. L. No. 104-292, Sec. 2, 110 Stat. 3459, 3459 (1996). For the purposes of this case, these amendments are not material.

[5] Congress's 1996 amendment, *inter alia*, codified these offenses as separate subsections of Sec. 1001. *See* Pub. L. No. 104-292, Sec. 2, 110 Stat. 3459, 3459 (1996) (codified at 18 U.S.C., Sec. 1001).

Marchisio, 344 F.2d 653, 666 (2nd Cir. 1965). Materiality in such cases, however, was not an issue to be decided by a jury, but rather an issue to be decided by the judge as a matter of law. *See, eg., United States v. Gribben,* 984 F.2d 47, 50-51 (2nd Cir. 1993). A conviction for making false statements or for making or using false writings, on the other hand, did not require any finding of materiality. *See United States v. Elkin,* 731 F.2d 1005, 1009 (2nd Cir. 1984); *see also United States v. Bilzerian,* 926 F.2d 1285, 1299 (2nd Cir. 1991).

Although Mandanici was charged with making false statements, it appears that Judge Zampano believed materiality was an element of the offenses charged, albeit one to be decided by him rather than by the jury.[6] Thus, at the close of Mandanici's trial, Judge Zampano did not instruct the jury that it had to find beyond a reasonable doubt that Mandanici's statements were material; instead, Judge Zampano himself made a finding of materiality.[7]

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[6] Other issues concerning materiality surfaced at trial. At the time of Mandanici's trial, there was a circuit split with respect to whether materiality was an element of making false statements to a federally insured bank in violation of Sec. 1014, *compare, eg., United States v. Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981) (holding that materiality is an element under Sec. 1014), *with United States v. Cleary*, 565 F.2d 43, 46 (2nd Cir. 1977) (holding that it is not), but it was *not* a required element within this Circuit, *see Cleary*, 565 F.2d at 46. Nevertheless, the parties at Mandanici's trial and Judge Zampano apparently believed that materiality was an element under Sec. 1014, and Judge Zampano charged the jury to that effect with respect to count four. In 1997, the Supreme Court resolved the circuit split on this issue, holding that materiality is not an element under Sec. 1014. *See United States v. Wells*, 519 U.S. 482, 484 (1997).

[7] Judge Zampano did not explicitly make a finding of materiality on the record. However, the parties agree that he made such a finding. Moreover, during the charging conference, Mandanici's trial counsel objected to an instruction proposed by the Government in which Judge Zampano would have charged the jury that he had found the statements material. Specifically, Mandanici's counsel stated in relevant part:

Judge Zampano submitted the case to the jury on March 4, 1983. On the same day, the jury returned a verdict of guilty on all three counts of making false statements in violation of Sec. 1001, and not guilty with respect to the charge under Sec. 1014. On direct appeal, we reversed Mandanici's conviction on one of the three Sec. 1001 counts for insufficiency of the evidence, but affirmed his convictions on the other two, finding that the evidence "amply support[ed]" the charges. *Mandanici*, 729 F.2d at 920; *see id,* at 921. Mandanici served a three-year term of probation and paid a $20,000 fine.

In June 1995, the Supreme Court ruled that if materiality is an element under Sec. 1001, a finding of materiality must be made by the jury, rather than by the judge. *See United States v. Gaudin,* 515 U.S. 506, 522-23 (1995). The Supreme Court refrained from expressly deciding whether materiality is an element under Sec. 1001,[8] but in *United States v. Ali,* 68 F.3d 1468 (2nd Cir. 1995), *amended on denial*

> I would object to your Honor instructing the jury that you have found the statements to be material. I understand that the law that's in the court, the power to submit or not submit a statement to the jury depending upon whether you determine it to be material or not.... [But notifying the jury that you have made such a determination] may add emphasis where none may be intended by the court, and none should be given.

From this statement, and the surrounding colloquy, it can be inferred that Judge Zampano made a finding of materiality as a matter of law.

Although the parties agree that Judge Zampano decided the question of materiality, they disagree about the standard of proof that he used in doing so. We discuss this issue in further detail below. *See infra* Section II.B.1.

[8] The Government in *Gaudin* had conceded that materiality was an element under Sec. 1001. *See* 515 U.S. at 509. Accordingly, the Supreme Court did not consider the issue. *See id.* at 524 (Rehnquist, C.J., concurring).

of reh'g, 86 F.3d 275 (2nd Cir. 1996), decided four months after *Gaudin,* we overruled our precedents and held that materiality is an element of any and all charges under Sec. 1001. *See id.* at 1474-75. Accordingly, the law in this Circuit now requires that for a conviction under Sec. 1001 to be sustained, the jury must have made a finding of materiality beyond a reasonable doubt.

On November 17, 1995, invoking *Gaudin,* Mandanici filed a petition for a writ of error *coram nobis* to vacate and expunge his convictions.[9] Mandanici alleged that his "[c]onstitutional rights to due process and to a jury trial were

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[9] This petition is not Mandanici's first attack on his convictions. After his convictions were affirmed on direct appeal, Mandanici filed a motion in April 1984 seeking, *inter alia*, a new trial on the ground that he was prejudiced by nondisclosure of certain documents. Following a four-day hearing, Judge Zampano denied Mandanici's motion, and we affirmed. *See United States v. Mandanici*, Crim. No. 82-1103 (D. Conn. Jan. 18, 1985) (rulings on motion for a new trial, motion to dismiss, and motion for fingerprinting), *aff'd*, 770 F.2d 158 (2nd Cir. 1985) (table), *cert. denied,* 474 U.S. 1082 (1986). In December 1988, Mandanici filed a petition for a writ of error *coram nobis* alleging selective prosecution and nondisclosure of certain documents. Judge Zampano denied the petition, and we affirmed by unpublished order. *See United States v. Mandanici,* Crim. No. 82-1103 (D. Conn. Mar. 8, 1989) (ruling on defendant's petition for writ of *corarn nobis), aff'd,* No. 89-2142 (2nd Cir. Sept. 1, 1989) (unpublished order). Finally, in July 1990, Mandanici filed another petition for a writ of error *coram nobis*, alleging, *inter alia*, selective prosecution, nondisclosure of certain documents, and that he lacked the requisite criminal intent. Once again, Judge Zampano denied the petition and we affirmed by unpublished order. *See United States v. Mandanici*, Crim. No. 82-1103 (D. Conn. Nov. 5, 1990) (endorsement order), *aff'd*, No. 90-1666 (2nd Cir. Apr. 24, 1991) (unpublished order). Thus, the present petition constitutes Mandanici's third petition for a writ of error coram nobis.

We note that Mandanici filed his present petition before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, Sec. 735, 110 Stat. 1214. Accordingly, we need not - and do not - decide whether AEDPA's provisions apply to *coram nobis* petitions. *Cf. United States v. Perez*, 129 F.3d 255, 260 (2nd. Cr. 1997) (holding that AEDPA's provision requiring a certificate of appealability for an appeal does not apply to Sec. 2255 petitions filed before the statute's effective date).

violated by the trial court's failure to instruct the jury that the government had the burden of proving beyond a reasonable doubt the element of materiality." In an opinion filed December 4, 1998, Judge Thompson denied the petition, relying on our decision in *Bilzerian v. United States,* 127 F.3d 237 (2nd Cir. 1997), to hold that *Gaudin* does not apply retroactively on collateral review. This timely appeal followed.

II

A writ of error *coram nobis* is "essentially a remedy of last resort for petitioners who are no longer in custody pursuant to a criminal conviction." *Fleming v. United States,* 146 F.3d 88, 89-90 (2nd Cir. 1998) (per curiam). *Coram nobis* is "not a substitute for appeal, and relief under the writ is strictly limited to those cases in which errors of the most fundamental character have rendered the proceeding itself irregular and invalid." *Foont v. United States,* 93 F.3d 76, 78 (2nd Cir. 1996) (internal quotation marks and ellipsis omitted); *see Nicks v. United States,* 955 F.2d 161, 167 (2nd Cir. 1992) (stating that a writ of error *coram nobis* should be granted "only where extraordinary circumstances are present"). In reviewing a petition for the writ, a court must presume that the proceedings were correct, and the burden of showing otherwise rests on the petitioner. *See Nicks*, 955 F.2d at 167.

To obtain *coram nobis* relief, a petitioner "must demonstrate that '1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ.'" *Fleming,* 146 F.3d at 90 (quoting *Foont,* 93 F.3d at 79). On appeal, we review *de novo* the question of whether a district judge applied the proper legal standard, but review the judge's ultimate decision to deny the writ for abuse of discretion. *See Fleming,* 146 F.3d at 90.

A.

As noted, Judge Thompson denied Mandanici's present petition on the ground that *Gaudin* does not apply retroactively on collateral review. In *Gaudin,* the Supreme Court held that if materiality is an element under Sec. 1001, the Fifth and Sixth Amendments require that a jury, not a judge, make the finding. *See* 515 U.S. at 522-23. Following *Gaudin,* we held in *Ali* that materiality is an element of any and all charges under Sec. 1001. *See* 68 F.3d at 1474-75. Thus, while before *Gaudin* and *Ali* materiality in a prosecution under Sec. 1001 could have been decided by the judge, or not at all (if materiality was not an element), now the issue is reserved for the jury in all cases.

In *Bilzerian,* we confronted the question of whether *Gaudin* and/or *Ali* applies retroactively on collateral review. Bilzerian had been convicted in 1989 of, *inter alia,* both concealing material facts *and* making false statements. *See* 127 F.3d at 239. In accordance with the law at the time (which was unchanged from 1983, when Mandanici was tried), the trial judge made findings of materiality with respect to the charges of concealing material facts; in contrast, the judge neither made findings nor instructed the jury concerning materiality with respect to the charges of making false statements. *See id.*[10]

In view of these facts, we engaged in a bifurcated analysis. First, with respect to Bilzerian's conviction for

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[10] In *Bilzerian,* we mistakenly attributed subsections to the version of Sec. 1001 that was in effect at the time of Bilzerian's trial. *See* 127 F.3d at 239. Nevertheless, it is apparent from the opinion-and from the post-1996 version of Sec. 1001 - that we there referred to the offense of concealing material facts and the offense of making false statements as Sec. 1001(a)(1) and Sec. 1001(a)(2), respectively.

concealing material facts, we held that *Gaudin* does not apply retroactively on collateral review. Applying the framework announced by the Supreme Court in *Teague v. Lane,* 489 U.S. 288, 301 (1989) (plurality opinion), we decided as a threshold matter that the rule in *Gaudin* was a "new" rule of constitutional criminal procedure. *See Bilzerian,* 127 F.3d at 240-41. Under *Teague,* new rules of constitutional criminal procedure do not apply retroactively on collateral review unless they fall into either of two categories: (1) new rules that "place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense"; or (2) "new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith,* 497 U.S. 227, 241-42 (1990) (internal quotation marks and citation omitted). We resolved that the *Gaudin* rule does not fall into either of these categories, and therefore held that it does not apply retroactively on collateral review. *See Bilzerian,* 127 F.3d at 241. The rule in *Gaudin,* we reasoned, "merely shifts the determination of materiality from the judge to the jury ... [and t]here is little reason to believe that juries will have substantially different interpretations of materiality than judges." Id.

In contrast, we concluded that the holding of *Ali*, that materiality is an element of the offense of making false statements in violation of Sec. 1001, does apply retroactively. *See Bilzerian*, 127 F.3d at 242. The rule announced in *Ali*, we explained, was substantive, rather than procedural. While a new rule of constitutional criminal procedure generally does not apply retroactively on collateral review, a new rule of substantive criminal law is presumptively retroactive because a defendant may have been "punished for conduct that simply is not illegal." *Id., see Ingber v. Enzor,* 841 F.2d 450, 453-54 (2nd Cir. 1988). We determined that the rule in *Ali* presented such a case; that is, *Ali* redefined Sec. 1001 "to legalize certain

conduct previously thought to be criminal." *Bilzerian,* 127 F.3d at 242. Accordingly, we held that the rule of *Ali* - that materiality is an element of the offense of making false statements in violation of Sec. 1001 - applies retroactively on collateral review. *See id.*[11]

B.

In Mandanici's case, materiality was *not* an element of the false statements offenses with which he was charged, and which survived intact following direct appeal. Thus, at first glance, his case would appear to be an *Ali*-type case. Nevertheless, as Mandanici concedes, Judge Zampano made a finding of materiality as a matter of law. Accordingly, in ruling on the present petition, Judge Thompson treated Mandanici's case as a *Gaudin*-type case and held, following *Bilzerian,* that the new procedural rule does not apply retroactively on collateral review.

On appeal, Mandanici challenges Judge Thompson's conclusion on the ground that Judge Zampano erred not only in failing to submit the question of materiality to the jury, but also in the standard of proof he used to decide the question as a matter of law. Specifically, Mandanici argues that (1) in accordance with Second Circuit law at the time, the issue of materiality was decided at his trial under a preponderance-of-the-evidence standard; (2) after *Gaudin* and *Ali*, materiality must be proved beyond a reasonable doubt; and (3) notwithstanding *Bilzerian,* this change in the law should be applied retroactively under *Teague*. We agree with the first two steps of this argument, but disagree with the third.

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[11] Despite this holding, we denied Bilzerian's petition for habeas relief on the ground that the failure to include materiality as an element was harmless. *See* 127 F.3d at 242.

1.

First, we are persuaded that Judge Zampano decided the issue of materiality at Mandanici's trial under the preponderance standard. The trial transcript itself does not make clear what standard Judge Zampano used.[12] However,

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[12] During the charging conference, Mandanici's trial counsel analogized Judge Zampano's finding of materiality to the finding of conspiracy by a preponderance of the evidence that a judge must make before admitting statements by a co-conspirator. *See United States v. Cicale*, 691 F.2d 95, 103 (2nd Cir. 1982) (stating that proof of a conspiracy for purposes of admitting co-conspirator statements need only be by a preponderance of the evidence); *see also Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). The record is otherwise silent with respect to the standard of proof Judge Zampano used.

Nevertheless, the Government would have us infer from Judge Zampano's jury instructions that he and/or the jury decided the issue of materiality using the reasonable doubt standard. With respect to each of the three counts charging violations of Sec. 1001, Judge Zampano charged the jury in relevant part:

> [T]here are three essential elements which the government must prove beyond a reasonable doubt .... The three essential elements are, first, that on the date in question and with respect to the document in question, the Defendant made or caused to be made a false, fictitious and fraudulent statement or representation .... Second, that he did such act or acts with knowledge that the writing or documents were false, fictitious and fraudulent *in some material part.* Third, that he did such act knowingly and willfully and with an intent to deceive.

We are unwilling to make the inference urged by the Government, however for two reasons. First, Judge Zampano made only brief reference to materiality-in the context of describing the element requiring proof of knowledge-and, unlike the other components of each element, he did not thereafter define the term. (In contrast, Judge Zampano explicitly defined the term 'material' with respect to count four - which charged bank fraud in violation of Sec. 1014 - apparently believing, albeit mistakenly, *see supra* note 6, that materiality was an element of that offense to be decided by the jury.) Second, at the time of Mandanici's trial, pattern jury instructions with respect to Sec. 1001 and like provisions often included

to the extent that materiality was treated as an element of an offense when Mandanici was tried, the law within this Circuit was that the judge decided the question as a matter of law under the preponderance standard. *See, e.g., Gribben,* 984 F.2d at 50-51 (stating that "[t]he government bears ... the burden of proving materiality [under both 18 U.S.C. Sec. 1623(a) and the first clause of Sec. 1001], but *its burden need not be 'beyond a reasonable doubt'; the burden is satisfied by a preponderance of the evidence"* (emphasis added)); *United States v. Cunningbam,* 723 F.2d 217, 226 (2nd Cir. 1983) ("Materiality [under Sec. 1623] is ordinarily to be determined by the court by a preponderance of the evidence. ").[13] Under these circumstances, we assume that Judge Zampano made his finding of materiality at Mandanici's trial using the

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references to materiality, even when the issue was one for the court rather than the jury. *See, eg., Waldemer v. United States,* 106 F.3d 729, 734 (7th Cir. 1997) (per curiam) (quoting the jury instructions with respect to the offense of making false statements before a grand jury, in violation of 18 U.S.C. Sec. 1623(a), from 2 SEVENTH CIRCUIT, FEDERAL CRIMINAL JURY INSTRUCTIONS 106-07 (West 1984)); *Wickersham v. United States,* 976 F. Supp. 551, 553 & n.2 (E.D. Tex. 1996) (quoting a jury instruction with respect to the offense of making false statements on an income tax return, in violation of 26 U.S.C., Sec. 7206(l)).

[13] The Government contends that our statement in *Gribben* applied only to charges of perjury under Sec. 1623(a), and not to charges under Sec. 1001, but we disagree. In dismissing the charges against Gribben and his codefendant in the first instance, the District Court had stated that the government bears the burden of proving materiality *both* under the first clause of Sec. 1001 *and* under Sec. 1623(a) by a preponderance of the evidence. *See United States v. Gribben,* 792 F. Supp. 960, 963 (S.D.N.Y. 1992), *rev'd,* 984 F.2d 47 (2nd Cir. 1993). And, in reversing, we reinstated the charges against Gribben *both* under Sec. 1623 and under Sec. 1001. See *Gribben,* 984 F.2d at 52.

Moreover, this conclusion accords with the Supreme Court's understanding of our precedent. In *Gaudin,* the Supreme Court cited our decision in *Gribben* for the proposition that some courts permit materiality under Sec. 1001 to be found by a mere preponderance of the evidence. See 515 U.S. at 510 n.1.

preponderance standard. *Cf. Bilzerian,* 127 F.3d at 240 ("A court in the Second Circuit, deciding the issue at the time of Blizerian's trial, would certainly have felt compelled to follow the existing precedent in its circuit.").

2.

Because it is plain that, after *Gaudin* and *Ali*, a finding of materiality under Sec. 1001 must be made using the reasonable doubt standard,[14] the next question is whether this change in the law applies retroactively on collateral review.[15]

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[14] Strictly speaking, *Gaudin* itself did not change the rule regarding the standard of proof on materiality. *See Gaudin*, 515 U.S. at 510 n. 1 ("The 'beyond a reasonable doubt' point is not directly at issue in the present case, since it is unclear what standard of proof the District Court applied in making its determination of materiality . . . ."). Instead, the change was a logical consequence of our subsequent holding in *Ali* that materiality is an element of any and all charges under Sec. 1001. *See* 68 F.3d at 1474-75.

[15] Several courts have held, as we did in *Bilzerian*, that *Gaudin* does not apply retroactively with respect to the issue of whether the judge or jury determines materiality. *See United States v. Shunk*, 113 F.3d 31 (5th Cir. 1997); *United States v. Swindall*, 107 F.3d 831 (11th Cir. 1997); *Wickersham v. United States*, 976 F. Supp. 551 (E.D. Tex. 1996); *United States v. Nazon*, 936 F. Supp. 563 (N.D. Ind. 1996); *United States v. Holland*, 919 F. Supp. 431 (N.D. Ga. 1996); *see also United States v. Dale*, 140 F.3d 1054, 1057-60 (D.C. Cir. 1998) (Henderson, J., concurring). *But cf. Waldemer v. United States*, 106 F.3d 729 (7th Cir. 1997) (per curiam) (applying *Gaudin* retroactively in a Sec. 2255 proceeding without discussing *Teague*). In contrast, whether *Gaudin* applies retroactively with respect to the standard of proof appears to be a question of first impression. *But cf.* Swindall, 107 F.3d at 836 (stating that if the appellant had "assert[ed] that the judge used a less exacting standard than 'beyond a reasonable doubt' in its determination that the false statements were material," his argument "would [have] implicate[d] the accuracy of the materiality finding," thereby perhaps triggering the second exception to the *Teague* rule); *Nazon*, 936 F. Supp. at 570 & n.2 (similar).

Although we did not explicitly address this issue in *Bilzerian*, it is arguable that we did so implicitly. That is, because Bilzerian's trial judge

Although we have never actually addressed the question of whether *Teague* applies to petitions for a writ of error *coram nobis,* we have stated that, "[b]ecause of the similarities between coram nobis proceedings and Sec. 2255 proceedings, the Sec. 2255 procedure often is applied by analogy in coram nobis cases." *Fleming,* 146 F.3d at 90 n.2 (internal quotation marks omitted). Accordingly, we now hold that *Teague* applies to *coram nobis* petitions. *See United States v. Swindall,* 107 F.3d 831, 833-34 & n.4 (11th Cir. 1997) (applying *Teague* to a *coram nobis* petition); *United States v. Nazon,* 936 F. Supp. 563, 568-69 (N.D. Ind. 1996) (same).

Under *Teague,* "new rules" of constitutional criminal procedure or novel applications of old rules "are generally not applied retroactively on [collateral] review." *Bilzerian,* 127 F.3d at 240; *see Stringer v. Black,* 503 U.S. 222, 227-29 (1992) (extending *Teague* to novel applications of old rules). A "new rule" is a rule that "breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague,* 489 U.S. at 301 (plurality opinion). Put differently, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* Under these standards, the requirement that materiality under Sec. 1001 be proved beyond a reasonable doubt is a new rule-or at least a novel application of an old rule. As we discussed above, prior to *Gaudin* and *Ali*, the law of this Circuit was that to the extent materiality was an element under Sec. 1001, it posed a question of law for the trial judge to decide under a preponderance-of-the-evidence

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presumably made his finding of materiality under the first clause of Sec. 1001 by a preponderance of the evidence, our holding that *Gaudin* does not apply retroactively with respect to that offense could be read as an implicit rejection of Mandanici's argument. Nevertheless, we decline to read into our *Bilzerian* opinion something that simply is not in it, particularly when doing so would entail resolution of complex constitutional questions.

standard. *See Gribben*, 984 F.2d at 50-51; *see also Gaudin*, 515 U.S. at 510 n. 1 (noting that "some courts," including this Court and the Sixth Circuit, "do not require the higher burden of proof"). Thus, it cannot be said that a court considering Mandanici's claim at the time his conviction became final "would have felt compelled by existing precedent to conclude" that the Constitution required proof of materiality beyond a reasonable doubt. *Gray v. Netherland*, 518 U.S. 152, 166 (1996) (internal quotation marks omitted); see *also Butler v. McKellar*, 494 U.S. 407, 412 (1990) ("A new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.'").

3.

Because the requirement that materiality be proved beyond a reasonable doubt for conviction under § 1001 is a new rule, it does not apply retroactively on collateral review unless it fits within one of the two *Teague* exceptions. Mandanici wisely concedes the inapplicability of the first *Teague* exception-for new rules that "place an entire category of primary conduct beyond the reach of the criminal law" or that "prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense." *Sawyer*, 497 U.S. at 241. Instead, he argues that the change in the law to require proof of materiality beyond a reasonable doubt fits within the second *Teague* exception. Although this question is a close one, we hold that the second *Teague* exception is also inapplicable.

The second *Teague* exception extends to new "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (internal quotation marks omitted). Although the Supreme Court has acknowledged that "the precise contours of this exception may be difficult to discern," *Saffle v. Parks*, 494

U.S. 484, 495 (1990), it has emphasized, through words and example, that the exception is exceedingly narrow, applying "only to a small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered liberty," *Graham v. Collins*, 506 U.S. 461, 478 (1993) (internal quotation marks omitted) (ellipsis in original). To fit within the second exception, it is not enough that a new rule "is aimed at improving the accuracy of trial," *Sawyer*, 497 U.S. at 242, or even that it promotes "[t]he objectives of fairness and accuracy," *Saffle*, 494 U.S. at 495. The new rule must also be a "watershed rule[]" that "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 241-42 (internal quotation marks and emphasis omitted). In short, it must be a "groundbreaking occurrence," *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994), a "sweeping" change that applies to a large swathe of cases rather than a "narrow right" that applies only to a "limited class" of cases, *O'Dell*, 521 U.S. at 167.

The Supreme Court has underscored the narrowness of the second *Teague* exception by invoking the "sweeping rule" of *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example of the type of rule that fits within the exception, *O'Dell*, 521 U.S. at 167; *see Saffle*, 494 U.S. at 495 (stating that a rule must have "the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception" to qualify under the second *Teague* exception); *see also Gray*, 518 U.S. at 170, and by repeatedly noting that "we believe it unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313 (plurality opinion); *accord Graham*, 506 U.S. at 478; *Sawyer*, 497 U.S. at 243; *Butler*, 494 U.S. at 416. The Supreme Court has further underscored the narrowness of the second Teague exception by its example. Beginning with the rule at issue in *Teague*, the Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria

for the second exception and, in every case, has refused to apply the rule at issue retroactively. *See O'Dell*, 521 U.S. at 167 (rule announced in *Simmons v. South Carolina*, 512 U.S. 154 (1994), that a capital defendant must be permitted to inform his sentencing jury that he is parole-ineligible if the prosecution argues that he is a future danger); *Lambrix v. Singletary*, 520 U.S. 518, 539-40 (1997) (rule announced in *Espinosa v. Florida*, 505 U.S. 1079 (1992), that in certain states where a sentencing judge is required to give deference to a jury's advisory sentencing recommendation with respect to the death penalty, neither the jury nor the judge is permitted to consider invalid aggravating circumstances); *Gray*, 518 U.S. at 170 (rule that the state's failure to give adequate notice of some of the evidence it intended to use in the petitioner's capital sentence proceeding violates due process); *Goeke v. Branch*, 514 U.S. 115, 120-21 (1995) (per curiam) (rule that due process generally prohibits a state appellate court from dismissing the appeal of a recaptured fugitive); *Caspari*, 510 U.S. at 396 (rule that twice subjecting a defendant to a noncapital sentence enhancement proceeding violates the Double Jeopardy Clause); *Gilmore v. Taylor*, 508 U.S. 333, 345-46 (1993) (rule announced in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), that the failure to instruct a jury that it could not return a murder conviction if it found that the defendant possessed a mitigating mental state violates due process); *Graham*, 506 U.S. at 478 (proposed rule that jury instructions preventing a petitioner's sentencing jury from considering mitigating evidence in capital sentencing proceeding violate the petitioner's Eighth and Fourteenth Amendment rights); *Sawyer*, 497 U.S. at 241-45 (rule announced in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that the Eighth Amendment prohibits the imposition of a death sentence by a jury that has been led to the false belief that responsibility for determining the appropriateness of the capital sentence lies elsewhere); *Saffle*, 494 U.S. at 495 (proposed rule that the trial court's instruction in the petitioner's capital sentence proceeding, telling the jury to

"avoid any influence of sympathy," violates the Eighth Amendment); *Butler*, 494 U.S. at 416 (rule announced in *Arizona v. Roberson,* 486 U.S. 675 (1988), that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation); *Teague,* 489 U.S. at 314-15 (plurality opinion) (rule announced in *Taylor v. Louisiana,* 419 U.S. 522 (1975), that the Sixth Amendment's fair cross-section requirement applies to a petit jury).

With these principles and examples in mind, we conclude that the rule requiring proof of materiality beyond a reasonable doubt for conviction under Sec. 1001 does not fit within the second *Teague* exception. To be sure, we agree with Mandanici that such a rule promotes both accuracy and fairness. *See, eg., In re Winship,* 397 U.S. 358, 363 (1970) (holding that the reasonable doubt standard is "a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." (internal quotation marks omitted)); *see also Sullivan v. Louisiana,* 508 U.S. 275, 281 (1993) (referring to the reasonable doubt requirement as "a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function" (alteration in original)); *cf. Nutter v. White,* 39 F.3d 1154, 1157-58 (11th Cir. 1994) (holding that the rule announced in *Cage v. Louisiana,* 498 U.S. 39 (1990) (per curiam), that certain jury instructions on the beyond-a reasonable-doubt standard violate due process, fits within the second *Teague* exception because "[t]he reasonable doubt standard guards against conviction of the innocent by ensuring the s*ystematic* accuracy of the criminal system" and an improper reasonable doubt charge "undermines the fundamental fairness of *every* trial in which it is used"). Moreover, we acknowledge that some cases, including at least

one in this Circuit, can be read to hold that promoting fairness and accuracy is, by itself, sufficient to qualify for the second *Teague* exception. *See Sanders v. Sullivan,* 900 F.2d 601, 606-07 (2d Cir. 1990) (holding that a rule prohibiting conviction based on the use of perjured testimony at trial even though the prosecution has no knowledge of its falsity qualifies for the second *Teague* exception); *see also Ostrosky v. Alaska,* 913 F.2d 590, 594-95 (9th Cir. 1990) (holding that a rule that a defendant has a due process right "to rely as a matter of law on a lower court decision in his own case that a statute is unconstitutional even though the case is on appeal to a higher court" fits within the second *Teague* exception). However, the Supreme Court has emphasized, most recently in *O'Dell,* that to qualify for the second *Teague* exception, a rule must also be a "watershed" rule. *See O'Dell,* 521 U.S. at 167; *see also Lyons v. Stovall,* 188 F.3d 327, 341-42 (6th Cir. 1999); *Spaziano v. Singletary,* 36 F.3d 1028, 1042-43 (11th Cir. 1994); *Cain v. Redman,* 947 F.2d 817, 822 (6th Cir. 1991). Indeed, in 1990, in *Sawyer v. Smith,* the Supreme Court explicitly rejected an argument made by the petitioner that "the second *Teague* exception should be read to include new rules ... that preserve ... accuracy and fairness," 497 U.S. at 242 (internal quotation marks omitted), admonishing that such a test

> looks only to half of our definition of the second exception. Acceptance of petitioner's argument would return the second exception to the broad definition that Justice Harlan first proposed in *Desist,* but later abandoned in *Mackey (v. United States*, 401 U.S. 667 (1971)), under which new rules that "significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Desist v. United States*, 394 U.S. 244, 262(1969). In *Teague,* we modified Justice Harlan's test to combine the accuracy element of the *Desist* test with the *Mackey* limitation of the exception to *watershed rules of fundamental*

> *fairness.* It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding. *Teague, 489* U.S. at 311 (quoting *Mackey*, 401 U.S. at 693).

497 U.S. at 242.

In short, unlike the "sweeping rule of *Gideon,* which established an affirmative right to counsel in all felony cases," *O'Dell*, 521 U.S. at 167, the requirement that materiality be proved beyond a reasonable doubt for conviction under Sec. 1001 is a "narrow right" that affects only "a limited class" of cases, *id.* - indeed, as we discussed above, it affects only a subset of Sec. 1001 cases, in the subset of circuits, like ours, that prior to *Gaudin* had allowed proof of materiality by a mere preponderance of the evidence. Thus, "[w]hatever one may think of the importance of [this] rule" - and we think it is of great importance - "it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception." *Saffle*, 494 U.S. at 495. Accordingly, the rule that materiality must be proved beyond a reasonable doubt for conviction under Sec. 1001 does not apply retroactively on collateral review, and Mandanici cannot challenge his 1983 conviction on the basis of any such error.

III.

To summarize, we hold as follows:

(1) With respect to the offenses of making false statements in violation of 18 U.S.C., Sec. 1001 of which Mandanici was convicted in 1983, and which survived intact

following direct appeal, the *trial judge* made a finding of materiality using the preponderance-of-the-evidence standard, consistent (to the extent relevant here) with the law of this Circuit at the time of the trial.

(2) Following *United States v. Gaudin,* 515 U.S. 506 (1995), and *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995), the law in this Circuit requires that for a conviction under Sec. 1001 to be sustained, the *jury* must have made a finding of materiality beyond a reasonable doubt.

(3) The framework established by the Supreme Court in *Teague v. Lane,* 489 U.S. 288 (1989), applies to petitions for a writ of error *coram nobis.*

(4) Under *Teague,* the change in the law of this Circuit to require a finding of materiality beyond a reasonable doubt in any and all prosecutions under Sec. 1001 is a new rule of constitutional criminal procedure or a novel application of an old rule - and therefore does not apply retroactively unless it falls within one of the two exceptions fashioned by the Supreme Court.

(5) This change concededly does not fit within the first *Teague* exception, for new rules that "place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense." *Sawyer v. Smith,* 497 U.S. 227, 241 (1990) (citation omitted).

(6) Nor does this change fit within the second *Teague* exception, for "new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer*, 497 U.S. at 241-42.

(7) Thus, the rule that materiality must be proved beyond a reasonable doubt for conviction under Sec. 1001 does not apply retroactively on collateral review, and Mandanici cannot challenge his 1983 conviction on the ground of any such error.

Accordingly, the judgment of the District Court is affirmed.

KEARSE, Circuit Judge, concurring:

I concur in the majority opinion and the judgment. I write separately to state my view that even absent *Teague* considerations, *coram nobis* relief would be inappropriate in this case.

An important difference between habeas relief and *coram nobis* lies in the fact that, because the latter comes after the petitioner has completed his sentence, the petitioner will not be retried; thus, the granting of *coram nobis* normally results in the expungement of the conviction, with no possibility of further proceedings to determine whether the petitioner was guilty of the offense charged. Accordingly, it has long been held that in order to obtain *coram nobis* relief a petitioner must show an error that "compel[s] . . . action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511(1954), *see, e.g.*, *Fleming v. United States*, 146 F.3d 88, 90 (2nd Cir. 1998); *Foont v. United States*, 93 F.3d 76, 79 (2nd Cir. 1996); *Nicks v. United States*, 955 F.2d 161, 167(2nd Cir. 1992).

In the present case, the error is that an element of the offense was found established by a preponderance of the evidence, rather than beyond a reasonable doubt. A preponderance means more likely than not. The element was the materiality of false statements made by petitioner

Mandanici in connection with obtaining payment for services on a federally funded construction contract. There is no contention in this petition that the evidence was not sufficient to establish materiality by a preponderance. (And the reason may be found in our opinion affirming on the two counts of conviction at issue here. *See United States v. Mandanici*, 729 F.2d 914, 920 (2nd Cir. 1984) (noting that the record showed not only that Mandanici had represented that the construction project was completed though it was not, but also that he had "submitted false documentation of his purported expenditures with respect to nearly every task detailed in" the contract's work specification); *id.* at 921 (noting that there was "ample proof" to permit a jury to find "that Mandanici had no intention of ever completing the agreed-upon work").)

Nor is there any suggestion here that a standard below that of preponderance was used. Thus, the consequences of granting a writ of *coram nobis* in this case would be to expunge, without possibility of reinstatement, the conviction of a person who more likely than not committed the offenses of which he stands convicted. In my view, the granting of *coram nobis* in such a circumstance could not properly be characterized as necessary to "achieve justice."

3. RULING OF THE SECOND CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of February two thousand two

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USA,
Appellee

v

Filed
FEB 28, 2002 Dkt No: 99-2059

Mandanici,
Appellant

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant John C. Mandanici.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By:_____
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